IN THE HIGH COURT OF JUDICATURE OF BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.897 of 2005

in

CHAMBER SUMMONS NO. 1656 OF 2004

in

T & J.I.SUIT NO. 33 OF 1986

Krishna Arjun Bhoir .. Appellant

versus

Gaurabai Ramchandra Patil & ors .. Respondents

...

Mr.Virag Tulzapurkar a/w Mr U.Mahajan i/b M/s.Divekar & Co.for the Appellant.

Mr.S.R.Mishra for Respondent nos. 1 - 16.

CORAM : R.M. LODHA AND

D.G. KARNIK, JJ

DATED : 22nd November 2005.

P.C.:

Heard.

2. Admit.

3. Mr.S.R. Mishra, Advocate waives service for respondent nos.1 to 16.

4. The appeal is heard finally at this stage.

5. The Chamber Summons was taken out by the executor of the will of the deceased Kanha Barik Mhatre for the following reliefs:-

> (a) That the Plaintiff be directed to deposit in this Hon'ble Court the sum of Rs.13,78,422/- towards the share of the Defendant Nos.2 to 4 and the Respondent Nos.1 to 5 and 7 to 12 in the estate of the deceased Kanha Barik Mhatre;
>
> (b) That it may be declared that on such deposit being made the Plaintiff be discharged of his obligation as Executor of the Will of the deceased Kanha Barik Mhatre and that the Defendant Nos.2 to 4 and the Respondent Nos.1 to 12 have no right, title and interest in the estate

of the deceased and particularly in respect of the immovable property more particularly described in the Schedule annexed hereto and marked Exhibit "A’.

6. The Chamber Summons was contested by the respondents.

7. The learned Chamber Judge dismissed the Chamber Summons holding that the same was beyond the testamentary jurisdiction of the Court.

8. During the course of hearing of the appeal, the learned counsel for the appellant submitted that the appellant - applicant pressed before the learned Chamber Judge prayer (a) and the part of prayer (b) whereby the executor sought discharge of his obligation as Executor of the Will. In other words, the learned counsel for the appellant - applicant submitted that the prayer in the Chamber Summons that the defendant nos.2 to 4 and that the respondent nos.1 to 12 have no right, title and interest in the estate of the deceased was not pressed. The learned counsel for the appellant thus submitted that with

regard to the prayers that were pressed, it was only the Testamentary Court that had jurisdiction in the matter.

9. On the other hand, the learned counsel for the respondents supported the impugned order and submitted that effectively the appellant sought the relief in the Chamber Summons relating to the agreement dated 2nd March 1993 and that was not within the jurisdiction of the Testamentary Court.

10. It was not disputed before us that probate to the Will of the deceased Kanha Barik Mhatre has been granted by this Court in Testamentary and Intestate Jurisdiction on 9th July 1998. In the probate granted by this Court on 9th July 1998, the present appellant has been appointed as a sole executor as to the Will executed by Kanik Barha Mhatre. Section 302 of the Indian Succession Act 1925 empowers the Testamentary Court to give to the executor any general or special directions with regard to the estate of the deceased testator. The probate having already been granted, the issue whether the sole executor could be discharged of his obligation on deposit of the amount as set out in the Chamber

Summons was surely within the exclusive jurisdiction of the Testamentary Court. The question is not whether in the facts and circumstances set out in the affidavit in support of Chamber Summons, the appellant at all could have been discharged as sole executor; that would be seen by the learned Chamber Judge at the time of hearing of Chamber Summons. However, that was not seen and the learned Chamber Judge dismissed the Chamber Summons on the ground that the Chamber Summons was beyond the jurisdiction of the Testamentary Court. The approach of the learned Chamber Judge cannot be countenanced. It was for the learned Chamber Judge to decide whether the sole executor of the Will of the deceased Kanha Barik Mhatre could at all be discharged of his obligations as the executor of the Will as this could only be decided in the testamentary jurisdiction.

11. We, accordingly, allow the appeal and set aside the order dated 11th August 2005 passed by the learned Chamber Judge. Chamber Summons No.1656 of 2004 is restored to the file of the learned Chamber Judge, save and except the bracket portion of prayer clause (b).

12. The learned Chamber Judge shall hear the parties and decide the Chamber Summons afresh in accordance with law.

13. For the sake of convenience, we reproduce the Chamber Summons that has been restored to file excluding the bracketed portion that reads thus:

> (a) That the Plaintiff be directed to deposit in this Hon'ble Court the sum of Rs.13,78,422/- towards the share of the Defendant Nos.2 to 4 and the Respondent Nos.1 to 5 and 7 to 12 in the estate of the deceased Kanha Barik Mhatre;
>
> (b) That it may be declared that on such deposit being made the Plaintiff be discharged of his obligation as Executor of the Will of the deceased Kanha Barik Mhatre.
>
> (c) ad-interim order in terms of prayer clauses (a) and (b) above;

(d) Costs of this Application be provided for;

(e) For such other reliefs as the nature and circumstances of the case may require.

16. No costs.

(R.M. LODHA, J)

(D.G. KARNIK, J)